JAN 3 2001

No. 99-2047

Supreme Court, U.S.
FILED
JAN 3 2001
CLERK

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer, and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF OF STATES OF CALIFORNIA, ALASKA, COLORADO, CONNECTICUT, GEORGIA, HAWAII, MAINE, MASSACHUSETTS, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OKLAHOMA, SOUTH DAKOTA, VERMONT AND WASHINGTON, THE DISTRICT OF COLUMBIA AND THE UNITED STATES VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

BILL LOCKYER
Attorney General of the State of California
RICHARD M. FRANK
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
JOSEPH BARBIERI
Deputy Attorney General
Counsel of Record
1515 Clay Street, Suite 2000
Oakland, California 94612-1413
Telephone: (510) 622-2139

Attorneys for State of California

[Additional Counsel Listed On Inside Cover]

BEST AVAILABLE COPY

BRUCE M. BOTELHO,
Attorney General of the
State of Alaska

KEN SALAZAR,
Attorney General of the
State of Colorado

RICHARD BLUMENTHAL,
Attorney General of the
State of Connecticut

THURBERT E. BAKER,
Attorney General of the
State of Georgia

EARL I. ANZAI,
Attorney General of the
State of Hawaii

ANDREW KETTERER,
Attorney General of the
State of Maine

THOMAS F. REILLY,
Attorney General of the
State of Massachusetts

MIKE MCGRATH,
Attorney General of the
State of Montana

FRANKIE SUE DEL PAPA,
Attorney General of the
State of Nevada

PHILLIP T. MCLAUGHLIN,
Attorney General of the
State of New Hampshire

JOHN J. FARMER, JR.,
Attorney General of the
State of New Jersey

ELIOT SPITZER,
Attorney General of the
State of New York

BETTY D. MONTGOMERY,
Attorney General of the
State of Ohio

W.A. DREW EDMONDSON,
Attorney General of the
State of Oklahoma

MARK W. BARNETT,
Attorney General of the
State of South Dakota

WILLIAM H. SORRELL,
Attorney General of the
State of Vermont

CHRISTINE O. GREGOIRE,
Attorney General of the
State of Washington

ROBERT R. RIGSBY,
Corporation Counsel
District of Columbia

IVER A. STRIDIRON,
Attorney General of the
United States
Virgin Islands

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT..... 5

ARGUMENT 7

I. THE WRIT SHOULD BE DISMISSED BECAUSE THE TRIAL COURT'S JUDGMENT WOULD NOT BE AFFECTED BY THE COURT'S RESOLUTION OF PALAZZOLO'S PETITION 7

II. A TAKING CLAIM IS NOT RIPE WHERE THE APPLICANT HAS NEITHER ESTABLISHED THE BOUNDARIES OF THE PROPERTY NOR APPLIED FOR THE PROJECT UPON WHICH HE BASES HIS CLAIM.... 8

A. Palazzolo Failed to Establish That He Owned the Property That He Alleged Was Taken..... 9

B. Palazzolo Failed to Submit a Meaningful Application 11

III. THE COURT SHOULD RETAIN THE RIPENESS DOCTRINE'S REAPPLICATION REQUIREMENT..... 14

IV. A LANDOWNER MUST DEMONSTRATE THAT A REGULATION HAS RENDERED PROPERTY "VALUELESS" IN ORDER TO ESTABLISH THAT THERE HAS BEEN A PER SE TAKING 16

V. THE RHODE ISLAND COURT PROPERLY FOUND THAT REASONABLE INVESTMENT-ACKED EXPECTATIONS AND BACKGROUND PRINCIPLES OF RHODE ISLAND LAW BARRED PALAZZOLO'S TAKING CLAIM 22

TABLE OF AUTHORITIES

Page

CASES:

Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999), *cert. denied*, 121 S.Ct. 51 (2000) 17

Alden v. Maine, 527 U.S. 706 (1999).....3, 5

Alegria v. Keeney, 687 A.2d 1249 (R.I. 1997)..... 17

Allen v. Allen, 19 R.I. 114, 32 A. 166 (R.I. 1895)..... 9

Andrus v. Allard, 444 U.S. 51 (1979) 21

Assembly of God Church v. Vallone, 89 R.I. 1, 150 A.2d 11 (R.I. 1959) 19

Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996)..... 24

Basile v. Town of Southhampton, 89 N.Y.2d 974, 678 N.E.2d 489, 655 N.Y.S.2d 877 (N.Y.App.), *cert. denied*, 522 U.S. 907 (1997)..... 26

Board of Supervisors of Prince William County v. Omni Homes, Inc., 253 Va. 59, 481 S.E.2d 460 (Va. 1997), *cert. denied*, 522 U.S. 813 (1997).....17, 23

Butner v. United States, 440 U.S. 48, 55 (1979)..... 3

Cavin v. United States, 956 F.2d 1131 (Fed.Cir. 1992) 10

CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal.App.3d 306, 118 Cal. Rptr. 315 (Cal.App. 1974)..... 27

Chioffi v. City of Winooski, 165 Vt. 37, 676 A.2d 786 (Vt. 1996) 18

City of Bakersfield v. Miller, 64 Cal.2d 93, 48 Cal.Rptr. 889, 410 P.2d 393 (Cal. 1966), *cert. denied*, 384 U.S. 988 (1966)..... 27

TABLE OF AUTHORITIES – Continued

Page

City of Riviera Beach v. Taylor, 659 So.2d 1174 (Fla.App. 1995)..... 12

City of Virginia Beach v. Bell, 255 Va. 395, 498 S.E.2d 414 (Va.), *cert. denied*, 525 U.S. 826 (1998) 24

Concrete Pipe and Prods., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993).....17, 23

County of St. Clair v. Lovingston, 90 U.S. 46 (1874) 11

Creppel v. United States, 41 F.3d 627 (Fed.Cir. 1994) 25

Del Monte Dunes, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), *aff'd on other grounds*, 526 U.S. 687 (1999) 18

District Intown Properties Ltd. v. District of Columbia, 198 F.3d 874 (D.C.Cir. 1999), *cert. denied*, 121 S.Ct. 34 (2000)..... 17

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 3

Executive 100 v. Martin County, 922 F.2d 1536 (11th Cir.), *cert. denied*, 502 U.S. 810 (1991)..... 15

FIC Homes of Blackstone, Inc. v. Conservation Comm'n, 41 Mass.App.Ct., 681 N.E.2d 61 (Mass.App. 1997)..... 17

Gazza v. New York State Department of Environmental Conservation, 89 N.Y.2d 603, 679 N.E.2d 1035, 657 N.Y.S.2d 555 (N.Y.App.), *cert. denied*, 522 U.S. 813 (1997) 25

Gerhard v. Bridge Commn'rs, 15 R.I. 334, 5 A. 199 (R.I. 1886)..... 21

Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1992)..... 11

TABLE OF AUTHORITIES – Continued

Page

Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359 (1948) 19

Gregory v. Ashcroft, 501 U.S. 452 (1991) 3

Grundy Center v. Marion, 231 Iowa 425, 1 N.W.2d 677 (Iowa 1942) 27

Hay v. City of Hanover, 436 N.W.2d 800 (Minn.App. 1991) 15

Herb v. Pitcairn, 324 U.S. 117 (1945) 7, 8

Indianapolis v. Miller, 168 Ind. 285, 80 N.E. 626 (Ind. 1907) 27

Jackvony v. Powel, 67 R.I. 218, 21 A.2d 554 (R.I. 1941) 29

Jewett v. Deerhorn Enterprises, Inc., 281 Or. 469, 575 P.2d 164 (Or. 1978) 28

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) 17, 19

Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 3

Landgate v. California Coastal Comm'n, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188 (Cal.), *cert. denied*, 525 U.S. 876 (1998) 10, 16

Landmark Land Co. v. Buchanan, 874 F.2d 717 (10th Cir. 1989) 15

Lechuza Villas West v. California Coastal Comm'n, 60 Cal.App.4th 218, 70 Cal.Rptr.2d 399 (1997), *cert. denied*, 525 U.S. 868 (1998) 10

Long Beach Equities, Inc. v. County of Ventura, 231 Cal.App.3d 1016, 282 Cal.Rptr. 877 (Cal.App. 1991), *cert. denied*, 505 U.S. 1219 (1992) 15

TABLE OF AUTHORITIES – Continued

Page

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) 9, 11, 15

McCuskey v. Canyon County Comm'rs, 128 Ida. 213, 912 P.2d 100 (Ida. 1996) 17

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991) 9

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 24

Olson v. United States, 292 U.S. 246 (1934) 20, 23

Outdoor Graphics v. City of Burlington, 103 F.3d 690 (8th Cir. 1996) 26

Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3d Cir.), *cert. denied*, 482 U.S. 906 (1988) 15

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 6, 18, 21, 22, 23, 24

People v. Donovan, 57 Cal.2d 346, 19 Cal.Rptr. 473, 369 P.2d 1 (Cal. 1962) 20

People v. New York Edison Co., 144 N.Y.S. 707, 159 A.D. 786 (N.Y.App.Div. 1913) 27

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) 9

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) ...4, 23

Smith v. Town of Wolfeboro, 136 N.H. 337, 615 A.2d 1252 (N.H. 1992) 10

TABLE OF AUTHORITIES – Continued

Page

Southern Pacific Transpr. Co. v. Los Angeles, 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991) 12, 13

Southview Assoc., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) 15

Starr v. Commn'r, 226 Conn. 358, 627 A.2d 1296 (Conn. 1992) 27

State v. McKee, 73 Conn. 18, 46 A. 409 (Conn. 1900) 27

Stern v. Halligan, 158 F.3d 729 (3d Cir. 1998) 17

United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943) 21

United States v. 50 Acres of Land, 469 U.S. 24 (1984) 19

United States v. Dow, 357 U.S. 17 (1958) 10, 24

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1975) 15

Williams v. City of Central, 907 P.2d 701 (Colo.App. 1995) 23

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 9, 12, 14, 15

Wilson v. Loew's, Inc., 355 U.S. 597 (1958) 7

Wooten v. South Carolina Coastal Council, 333 S.C. 469, 510 S.E.2d 716 (S.C. 1999) 26

Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996) 17

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

U.S. Constitution
Fifth Amendment 19, 21

STATUTES:

Cal. Pub. Resources Code § 30010 13

R.I. Gen. Laws 46-6-1 (1956) 21

OTHER AUTHORITIES:

Appraisal Institute, "Real Estate Valuation in Litigation" (2d.Ed. 1995) 20

Interagency Land Acquisition Conference, "Uniform Appraisal Standards For Federal Land Acquisitions" (1992) 20

Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* (1984) 28

INTERESTS OF AMICI CURIAE

This is not a case about ethereal concepts of property. It concerns a speculator who, without providing the regulatory agency the opportunity to review his actual development plan, seeks to have the taxpayers of Rhode Island compensate him because he has been frustrated in his pursuit of a use that, if permitted, would pollute the town's water supply. The expanded conception of the taking doctrine being posed here threatens not only the treasuries of the States, but their distinct interests in developing real property and land use rules that strike an appropriate balance between public needs and private rights. The Rhode Island Supreme Court's decision preserves those interests, and its decision should be affirmed.

Between 1959 and 1969 Anthony Palazzolo and his corporation acquired the property that is the subject of this taking claim for a total of $13,000, which Palazzolo concedes was the fair market value of the property at the time of acquisition. Decision, R.I. Sup.Ct. No. 88-0297, at 1-2; Trial Exh. E at 3. In the mid-1960's and early 1970's, Rhode Island rejected Palazzolo's applications to fill this intertidal salt marsh, and Palazzolo did not pursue a taking claim following the last denial. Having waived any taking claim based on the first round of administrative decisions, Palazzolo then made identical applications in the 1980's.

Palazzolo insisted during the 1985 administrative process that he wished to fill a portion of the property for a "beach facility," and his attorney even objected during the hearing to any consideration of residential use. *See*

pp. 11-12 *infra*. As Palazzolo later admitted, however, he always intended to use the fill for residential development. *See* pp. 11-12 n.3 *infra*. Palazzolo thus prevented the agency from defining the residential uses that it might have permitted had it known that Palazzolo wished to develop the entire parcel for this quite different purpose.

At trial, Palazzolo dispensed with the beach facility proposal and claimed that he was entitled to compensation for his lost opportunity to develop 74 residential units. The State produced evidence which showed that most of the fill proposed by Palazzolo would be deposited on State-owned tidelands below the mean high tide line. See p. 9 *infra*. At the conclusion of trial, the trial court rejected Palazzolo's taking claim, finding that his residential project would create a public nuisance and that, even with the permit denial, the property was worth $200,000 because the State would have approved limited residential use had he only applied. The Rhode Island Supreme Court affirmed.

Retaining as much value as it does, Palazzolo's property is still worth more than fifteen times what he paid for it. There has never been a regulatory taking in these circumstances. But Palazzolo contends that a taking nevertheless has occurred because he was entitled to a "reasonable return" of $3.1 million – *an amount more than 200 times the fair market value of his initial investment*. No one has ever strayed so far from the original meaning of the Fifth Amendment.

Given the implications of Palazzolo's extraordinary arguments, the States' concerns here are not surprising. Some of these concerns are practical. This case invites an

enormous expansion of the ripeness doctrine and even more takings litigation. If applicants are no longer required to apply for the uses on which they base their taking claims, it is not hyperbole to suggest that virtually every applicant challenging a permit denial will append a taking claim based on the loss of some use never considered by the agency.

The States also are concerned with the potential liability threatened by Palazzolo's extravagant construction of the taking doctrine. The Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) was clear: regulation categorically denies all economically viable use only when it renders property "valueless." Palazzolo's view that there has been a per se taking under *Lucas* unless government regulation allows a reasonable return to a speculative enterprise would threaten to deplete the States' resources by creating "new and unforeseen claims in vast amounts." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in part and dissenting in part).

But this latest threatened expansion of the taking doctrine also touches important concerns of federalism. In much of its recent jurisprudence this Court has emphasized the benefits of decentralized government and acknowledged the sovereignty of the States. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The state interests implicated by this case – state real property law and state land use regulation – are matters of peculiar state concern. *See Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979); *Butner v. United States*, 440 U.S. 48, 55

(1979). State law always has been understood to define property interests, and accordingly, a landowner's expectations. *E.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). But Palazzolo's view federalizes property law – rather than allow state law to define expectations, it assumes that there is a natural law of property with an inherent expectation of use to which the States must conform their rules of property.

These concerns are more than philosophical. It is sometimes easy to take for granted the extraordinary responsibility that State and local governments bear in regulating a society as large, complex and diverse as ours, a responsibility that is weighted with the obligation of conserving resources for future generations. When the federal judiciary is asked to create an artificial conception of "property" in which landowners are to be guaranteed a return on investment and a permit denial is presumed to conscript private property into public use, the balance of the system is threatened. Rather than engage in the sensitive accommodation of private and public interests demanded by modern land use regulation, agencies will begin to make decisions to avoid the exorbitant expense of defending taking claims and the threat of liability if they take any misstep along the way.

In the end, the Palazzolo view reflects a not-so-subtle shift from the narrow restraints of *Lucas* to a regime in which property is redefined in a way that "singles out" the public interest to bear the risks of unfounded private expectations. This level of intrusion into state property law and land use decisionmaking is unjustified. After all, the regulatory system is the product of a political process

in which landowners are well-represented, and this political process already provides a powerful restraint against excessive regulation. Moreover, the Court has informed state courts and legislators of the need for vigilance in these matters, and this Court has been "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States." *Alden*, 527 U.S. at 755.

There is no constitutional imperative to justify Palazzolo's proposed redefinition of state property rules and recalibration of the delicate land use process. The decision reached here by the Rhode Island Supreme Court was the end product of its evaluation of several factors: state real property law, the expectations created by over a century of land use restrictions on fill activities, the enormous harms threatened by the proposed project, and the equitable considerations presented by an applicant who refuses to say what he is doing and expects the public to pay for his speculative lost profits. The Court should not overrule the Rhode Island court's evaluation, much less relax the ripeness doctrine and expose public agencies to liability for every permit denial that frustrates a landowner's profit expectations.

The judgment below should be affirmed.

SUMMARY OF ARGUMENT

1. The trial court's judgment was based on the independent ground that Palazzolo did not have a property right to engage in the proposed use because the filling of these particular wetlands would constitute a public

nuisance under Rhode Island common law. Because the Court's resolution of the questions presented will not alter the trial court's judgment, the writ should be dismissed as improvidently granted.

2. Palazzolo failed to meet even minimal ripeness standards because he neither established that he owned the property alleged to be taken nor did he apply for the project upon which he bases his claim. Adherence to the "reapplication requirement" remains necessary to insure that an agency's denial of a particular project is not improperly construed as the denial of all use.

3. Whether an agency's action deprives property of all economically viable use under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) should be judged on whether the agency's action has rendered the property "valueless." In determining the impact of a regulation's impact on the value of property, an analysis of the property's fair market value before the alleged taking must include all those restrictions on development that a reasonable buyer would have considered.

4. Based on its assessment of Palazzolo's reasonable investment-backed expectations, the Rhode Island Court properly rejected Palazzolo's taking claim under the ad hoc inquiry in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-125 (1978). Further, it makes little difference when Palazzolo acquired the property, because landowners in Rhode Island acquire property subject to the right of the Legislature to declare public nuisances such as the filling of these wetlands.

ARGUMENT

I. THE WRIT SHOULD BE DISMISSED BECAUSE THE TRIAL COURT'S JUDGMENT WOULD NOT BE AFFECTED BY THE COURT'S RESOLUTION OF PALAZZOLO'S PETITION.

If a judgment below rests on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted. *E.g., Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958). The Court exercises its power "to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). This case calls for the application of this principle.

As the trial court found, Palazzolo's proposed filling of 18 acres of salt marsh would have significant offsite impacts. The proposed project would reduce existing salt marsh in adjacent Winnapaug Pond, harm fish populations, and increase nitrate levels in the groundwater that is the town's sole source of drinking water. These serious project impacts would constitute a public nuisance under Rhode Island common law. The trial court thus concluded that the State's nuisance law prohibited Palazzolo's taking claim. Decision, R.I. Sup.Ct. No. 88-0297, at 10-11; see JA at 80-93 (testimony of Reis).

This conclusion would not be affected by the Court's resolution of the questions presented in Palazzolo's petition for a writ of certiorari. None of the questions presented to this Court challenge the directive in *Lucas* that a

state's common law of public nuisance serves as a background principle of real property law that limits the permissible uses of property. Assuming arguendo that this Court resolved all of the questions presented in Palazzolo's favor, the trial court on remand would need to revise its written opinion, but its judgment would be unaffected because its public nuisance determination would continue to function as a complete defense to the taking claim. This is not speculation. The trial court already has said as much, finding that "even were this Court to determine that the CRMC's denial of the plaintiff's application was a 'total taking' under *Lucas*, the nuisance doctrine would prevent this Court from awarding the plaintiff compensation." Decision at 11.

Because the same judgment would be rendered by the state court after the Court corrected its views of federal law, this Court's present review would amount to nothing more than an advisory opinion. *See Herb*, 324 U.S. at 125-126. The writ therefore should be dismissed as improvidently granted.

II. A TAKING CLAIM IS NOT RIPE WHERE THE APPLICANT HAS NEITHER ESTABLISHED THE BOUNDARIES OF THE PROPERTY NOR APPLIED FOR THE PROJECT UPON WHICH HE BASES HIS CLAIM.

Under the "ripeness" doctrine, a claim that government regulation effects a taking of property must be dismissed unless the government entity charged with implementing the regulation has reached a "final and authoritative" decision regarding the application of the

regulation to the property at issue. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 190 n.11, 199-200 (1985). The Court's cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates*, 477 U.S. at 351. Although much of the attention has focused on Palazzolo's failure to resubmit less ambitious development plans, Palazzolo's taking claim was unripe for other reasons.[1]

A. Palazzolo Failed to Establish That He Owned the Property That He Alleged Was Taken.

During the administrative process and at trial, Rhode Island demonstrated that most of the lands that Palazzolo proposed to fill were below the mean high tide line, see, e.g., Joint Appendix (JA) at 27 (CRMC decision), at 60-62 (testimony of Fugate), at 90 (stipulation of Palazzolo's attorney); Trial Exhs. T, U, V, AA (showing tidal elevations), and therefore were public trust lands belonging to Rhode Island. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988); *Allen v. Allen*, 19 R.I. 114, 32 A. 166 (R.I. 1895). Finding the taking claim deficient on so many other grounds, the lower courts never reached the ownership issue, even though Rhode Island pressed it throughout the lower court proceedings. Br. of Appellees,

---

[1] Because it is jurisdictional, a ripeness argument may be raised at any time. *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 265 n.13 (1991).

Palazzolo v. Rhode Island, R.I. Supr. Ct. No. 98-333A at 34. Palazzolo's taking claim is not ripe until this most basic of ripeness issues – who owns what – is decided.

A taking claim cannot be predicated on the deprivation of property unless the plaintiff can demonstrate "undisputed ownership" of the property at the time of the alleged taking. *Cavin v. United States*, 956 F.2d 1131, 1134 (Fed.Cir. 1992); *see United States v. Dow*, 357 U.S. 17, 20-21 (1958). It follows that an agency cannot make a final decision on the scope, type, intensity and location of approvable development if it does not know the boundaries of the property on which the development is to be located. Likewise, it would be premature for a court to adjudicate "how far" a regulation goes in its impact on property without this information; as just one example, a court could not begin to determine the economic impact of a permit denial on the value of property without knowing whether the affected property consisted of five, ten or 20 acres.

The state courts have addressed this issue, and have found that a taking claim is not ripe until the landowner establishes the boundaries of the property that he proposes to develop and upon which he bases his taking claim. *Lechuza Villas West v. California Coastal Comm'n*, 60 Cal.App.4th 218, 70 Cal.Rptr.2d 399, 410-11 (1997), *cert. denied*, 525 U.S. 868 (1998) (dismissing taking claim as unripe where applicant had not established seaward tidelands boundary of property); *see Landgate v. California Coastal Comm'n*, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188 (Cal.), *cert. denied*, 525 U.S. 876 (1998) (no final decision until court first determined lot lines of property proposed for development); *Smith v. Town of Wolfeboro*,

136 N.H. 337, 615 A.2d 1252 (N.H. 1992) (no taking where issue of lot legality had not been resolved).

The Court therefore should dismiss the taking claim as unripe until the Rhode Island courts first decide whether the State or Palazzolo owns the property alleged to have been taken.[2]

B. Palazzolo Failed to Submit a Meaningful Application.

The ripeness doctrine also requires that a claimant submit a "meaningful application." *MacDonald, Sommer & Frates*, 477 U.S. at 353 n.8; *see, e.g., Gilbert v. City of Cambridge*, 932 F.2d 51, 63 n.15 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1992). As the Rhode Island court found, Palazzolo never applied for the residential uses upon which he now bases his taking claim. *Palazzolo*, 746 A.2d at 714. Indeed, Palazzolo in both 1983 and 1985 failed to disclose his actual reasons for seeking to fill the salt marsh.[3] His failure to apply for the project upon which he

---

[2] Palazzolo may contend that he had record title to these lands and that Rhode Island did not acquire them through the process of erosion. That argument would be erroneous because riparian owners are subject to the gain and loss of title through the processes of accretion and erosion. *E.g., County of St. Clair v. Lovingston*, 90 U.S. 46 (1874). Moreover, any such argument only would underscore the need for resolution of the title issue before adjudicating the taking claim.

[3] At the August 18, 1983 administrative hearing, Palazzolo testified under oath as follows:

Q: Do you propose to build on this property?

A: Not necessarily. . . .

bases his taking claim makes it unripe. *Williamson Planning Comm'n*, 473 U.S. at 189-90; *see Southern Pacific Transpr. Co. v. Los Angeles*, 922 F.2d 498, 503-04 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991); *City of Riviera Beach v. Taylor*, 659 So.2d 1174, 1180-81 (Fla.App. 1995).

Palazzolo says that none of this matters because Rhode Island (in his estimation) would have denied any project that he submitted. The ripeness doctrine, however, is not satisfied by having the landowner make assumptions about the final decision that an agency might have reached if the proper application had been made. Public agencies seek to avoid making decisions that result in the taking of property, and they need to understand the consequences that their actions might

---

Q: Do you know whether or not it would pass a perk test?

A: It is not necessary at this time. It would be necessary if I said I wanted to build houses. I am not saying that. Trial Exh. DD (transcript of 1983 hearing), pp. 20, 22; see Trial Exh. I (1983 application of Palazzolo to CRMC, describing proposed use of fill); Trial Exh. DD (transcript of 1985 hearing, testimony of Palazzolo witness Grant) at 45; Trial Exh. I (1985 application of Palazzolo, stating "[t]here will be NO structures on the property and no individual disposal systems") (emphasis in original).

At trial in 1997, Palazzolo told a much different story:

Q: Now, when you applied in 1983 to CRMC, what did you make application for?

A: I made application to build houses, the house lots, fill. I wanted to fill.

Q: And was that your intent at the time, was to do residential development?

A: Yes, it was. Trial Testimony, Vol. 1, at 65.

have on a landowner's actual intended use of property. Moreover, many agencies have statutory (or implied) authority to permit uses that might otherwise conflict with the agency's policies if such an approval is necessary to avoid a taking. *See, e.g.*, Cal. Pub. Resources Code, § 30010; *Southern Pacific Transpr. Co*, 922 F.2d at 503 n.5. Agencies cannot exercise this authority, however, if project proponents do not say what they really want.

Had Palazzolo applied for a residential use, he would have been required to undertake an environmental review and obtain approvals for septic systems that would have enabled the regulatory agency to determine the costs and impacts of the proposed use and the consequences of a permit denial. JA at 50-57 (testimony of Chateauneuf); at 63-67 (testimony of Fugate). Once this application was complete, the agency could have considered the possibility of an alternative residential project on the upland portions of the site. See JA at 70. Palazzolo's application for a beach facility, however, gave the agency no reason to consider residential use. JA at 63-65. Indeed, at the 1985 hearing, Palazzolo's attorney successfully *objected* to questions about possible residential uses. Trial Exh. DD (transcript of 1985 hearing) at 67.

In addition, Palazzolo's taking claim is based on the denial of use of the entire parcel but his beach facility application proposed to fill only about 11.4 acres. Trial Exh. I (Palazzolo's profile of proposed fill). It cannot be assumed that, because an agency denies use on one portion of a parcel, it necessarily would have denied use of the entire parcel. Here, the 11.4 acres that Palazzolo proposed to fill were exclusively wetlands and excluded the

upland portions of the property. Trial Exh. I (1985 application of Palazzolo) at 2 ("[t]here will be no filling of the existing high areas"). Had Palazzolo applied to develop the entire parcel for a residential use, the record suggests that the Rhode Island agency might have approved up to four houses on upland portions of the property that had been excluded from the 1985 application. Trial Testimony, Vol. 1, at 209-211 (testimony of Fugate). Although Rhode Island finally had a chance to present evidence regarding the possibility of residential use *at trial*, the ripeness doctrine demands that this opportunity be provided *during the administrative process* where the agency is in a position to properly review and approve an alternative development that might avoid a taking claim. *E.g., Williamson Planning Comm'n.*

Palazzolo's taking claim is not ripe because he never submitted a meaningful application for the residential use that now forms the basis of his taking claim.

III. THE COURT SHOULD RETAIN THE RIPENESS DOCTRINE'S REAPPLICATION REQUIREMENT.

Because "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews," the ripeness doctrine has required that applicants refine their projects and submit additional applications to demonstrate that there has been a definitive action by the agency indicating with some specificity what level of

development will be permitted. *MacDonald, Sommer & Frates,* 477 U.S. at 351, 353.[4]

The reapplication requirement performs an indispensable function: it insures that the denial of a particular project will not be equated as the denial of all use of the property. This promotes the rule that takings only occur in the "extreme circumstances" where a permit is denied *and* the effect of the denial is to prevent "economically viable" use of the property. *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 126, 127 (1975).

In fact, most permit denials are not final and authoritative decisions about the use to which property can be put. Agencies may be required to deny projects where projects fail to comply with informational requirements, ignore zoning restrictions, or conflict with resource protection policies. Even sophisticated, well-conceived projects may necessitate denials until they can be adjusted to meet reasonable land use and environmental concerns. Yet, once the developer has addressed the outstanding issues and the agency is in a position to make a final use

---

[4] Following the lead of *Williamson* and *MacDonald,* the lower courts repeatedly have dismissed claims as unripe where applicants failed to modify their projects in any meaningful way following initial rejection of their plans. *See, e.g., Southview Assoc., Ltd. v. Bongartz,* 980 F.2d 84, 95-98 (2d Cir. 1992), *cert. denied,* 507 U.S. 987 (1993); *Executive 100 v. Martin County,* 922 F.2d 1536, 1541 (11th Cir.), *cert. denied,* 502 U.S. 810 (1991); *Landmark Land Co. v. Buchanan,* 874 F.2d 717, 721 (10th Cir. 1989); *Pace Resources, Inc. v. Shrewsbury Township,* 808 F.2d 1023, 1029 (3d Cir.), *cert. denied,* 482 U.S. 906 (1988); *Long Beach Equities, Inc, v. County of Ventura,* 231 Cal.App.3d 1016, 282 Cal.Rptr. 877, 886 (Cal.App. 1991), *cert. denied,* 505 U.S. 1219 (1992); *Hay v. City of Hanover,* 436 N.W.2d 800, 804-05 (Minn.App. 1991).

determination, development is usually approved. Thus, by demanding that applicants stick with the process, the reapplication requirement avoids taking claims and helps insure that an interim permit denial is not wrongly assumed to be a denial of all use.

Compliance with the reapplication requirement may prove frustrating at times, but the requirement nevertheless encourages compromise by all parties at the administrative level and deters unproductive litigation. And, while there may be occasional lapses, agencies have little incentive to abuse the reapplication requirement. Where agencies deny applications for reasons that, from an objective standpoint, are pretextual and in bad faith, that conduct by itself may be a constitutional violation. *See Landgate*, 953 P.2d at 1199, 1203. Short of that, the applicant should retain the burden of demonstrating that the agency has made a final and authoritative decision.

Palazzolo's claim that he was denied all use of the property, rejected as a factual matter by the State courts, is unripe under any conception of the ripeness doctrine.

IV. A LANDOWNER MUST DEMONSTRATE THAT A REGULATION HAS RENDERED PROPERTY "VALUELESS" IN ORDER TO ESTABLISH THAT THERE HAS BEEN A PER SE TAKING.

Palazzolo contends that he may establish a categorical (or "per se") regulatory taking even if the property retains significant value following the agency's decision. Palazzolo's view represents an unwarranted departure from *Lucas* and numerous cases following it, and the Court should reject it.

In order to establish a per se regulatory taking, the claimant must establish that there has been a final determination that both prohibits all use *and* that destroys the property's value. This follows from *Lucas*, where the Court accepted that there had been a per se taking because the South Carolina statute flatly prohibited all use and left the property "valueless." *Lucas*, 505 U.S. at 1015-19 & n.8. Acknowledging the stringency of this approach, the Court recognized that per se takings would be "relatively rare" and "extraordinary." *Id.* at 1016, 1017.

Throughout its taking jurisprudence, the Court has analyzed a taking claim on the basis of the regulation's impact on the value of the affected property. *E.g., Concrete Pipe and Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987). With rare exception, the lower courts applying *Lucas* have required that a person claiming a per se regulatory taking demonstrate that the government action effectively destroyed the value of the property. *See, e.g., District Intown Properties Ltd. v. District of Columbia*, 198 F.3d 874, 882 (D.C.Cir. 1999), *cert. denied*, 121 S.Ct. 34 (2000); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1231 (11th Cir. 1999), *cert. denied*, 121 S.Ct. 51 (2000).[5] Implicitly recognizing

---

[5] Other cases include *Stern v. Halligan*, 158 F.3d 729, 734-35 n.7 (3d Cir. 1998); *FIC Homes of Blackstone, Inc. v. Conservation Comm'n*, 41 Mass.App.Ct. 681, 673 N.E.2d 61, 67 (Mass.App. 1997); *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460, 464 (Va. 1997), *cert. denied*, 522 U.S. 813 (1997); *Alegria v. Keeney*, 687 A.2d 1249, 1253 (R.I. 1997); *McCuskey v. Canyon County Comm'rs*, 128 Ida. 213, 912 P.2d 100, 103 n.2 (Ida. 1996); *Zeman v. City of Minneapolis*, 552

that he cannot challenge the Rhode Island's factual finding that the property is still worth $200,000, Palazzolo poses a number of approaches to avoid it. These raise a number of problems.

Initially, Palazzolo's contention that he lost 93.7% of the value of the property based on his "allegation" that his property was worth $3.1 million is erroneous. Pet. Br. at 38-40. Palazzolo forgets that a trial was held on this issue, and the Rhode Island court rejected Palazzolo's claim that the property was worth $3.1 million as "speculative." *Palazzolo*, 746 A.2d at 715 & n.7. Palazzolo's entire claim of deprivation is therefore premised on an allegation that was rejected as factually untrue by the lower courts.[6]

In addition, Palazzolo's allegation that the property is worth $3.1 million is based on a serious misconception of how the value of property should be computed when quantifying the impact of regulation, whether under the per se test in *Lucas* or the ad hoc inquiry in *Penn Central*. Palazzolo's computation of the value of the property before the alleged taking improperly assumed that he

---

N.W.2d 548, 553 n.4 (Minn. 1996); *Chioffi v. City of Winooski*, 165 Vt. 37, 676 A.2d 786, 790 (Vt. 1996). One exception is *Del Monte Dunes, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996), *aff'd on other grounds*, 526 U.S. 687 (1999). The Court did not address this aspect of the Ninth Circuit's decision. *Del Monte Dunes, Ltd.*, 526 U.S. at 704.

[6] At trial, Rhode Island demonstrated that, because of substantial infrastructure costs ignored by Palazzolo's appraiser, the entire parcel was worth only $55,000 even if fully developed as a residential project. JA at 101, 104 (testimony of Andolfo); see Joint Lodging No. 1, Items 9 and 10.

would have been entitled to develop all 74 units without any significant development restrictions. *Palazzolo*, 746 A.2d at 715 & n.7. Palazzolo's misconception of how value is determined is not unusual and merits consideration by the Court.

In determining compensation claims under the Fifth Amendment, the Court typically has measured deprivation by the regulation's impact on a property's fair market value. *See Keystone Bituminous Coal Assn.*, 480 U.S. at 497 (taking determined by considering a property's value before and after taking); *United States v. 50 Acres of Land*, 469 U.S. 24, 25-26 (1984). Fair market value is typically defined as:

> the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied. *Assembly of God Church v. Vallone*, 89 R.I. 1, 150 A.2d 11, (R.I. 1959), citing 4 Nichols, Eminent Domain (3d ed.), § 12.2 [1], p. 32; *see, e.g., Grand River Dam Authority v. Grand-Hydro*, 335 U.S. 359, 367-368 (1948) (applying Oklahoma law).

The Court long ago rejected the idea that fair market value is determined by the landowner's idealized view of the uses to which property might theoretically be put. In determining fair market value between willing buyers and sellers:

> [T]here should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining . . . Elements affecting value

> that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration . . . *Olson v. United States*, 292 U.S. 246, 257 (1934).

The state courts look at this the same way. *See People v. Donovan*, 57 Cal.2d 346, 19 Cal.Rptr. 473, 369 P.2d 1, 8 (Cal. 1962) ("the trier of fact is entitled to and should consider those facts which a buyer would take into consideration in arriving at a fair market value," including zoning restrictions); *see also Appraisal Institute*, "Real Estate Valuation in Litigation" (2d.Ed. 1995), at 135 (potential purchasers in market place consider added risk of permit denial in determining price that they are willing to pay); *Interagency Land Acquisition Conference*, "Uniform Appraisal Standards For Federal Land Acquisitions" (1992), at A-23, found at http://www.usdoj.gov/enrd/land-ack/.

Therefore, the value of property "before" an alleged taking must take into account the existing restrictions on use of the property and all other pertinent matters on development potential that a buyer would consider. *See Olson*, 292 U.S. at 257. In determining the fair market value of the Palazzolo property in 1978, for example, it must be assumed that a reasonable buyer would take into account, *inter alia*, zoning, septic requirements, infrastructure costs, public trust claims, existing state and federal wetlands regulations, and the State's previous denial of development applications in the 1960's. Although a reasonable buyer in this situation would not assume that the agency would unlawfully "take" the property, she would

assume that the permit process for intensive residential use would be difficult and that, because of these various problems, it would be speculative how much development the agency might actually approve. Consequently, when the agency denied the permit in 1985 – the time of the action giving rise to the alleged taking – there would be little diminution in value because the market had already accounted for the possibility of that permit decision.[7]

The Court also should reject Palazzolo's claim that government regulation causes a per se taking unless the landowner receives a "reasonable return" on his investment. Pet. Br. at 42, 44. There is no authority and no constitutional policy that requires that the regulatory taking doctrine guarantee a profitable investment. The futility of Palazzolo's position is underscored by the Court's repeated admonitions that regulation legitimately may cause a substantial diminution in value and that the Fifth Amendment does not guarantee a profitable return. *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Penn Central*, 438 U.S. at 131; *see United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 285 (1943).

---

[7] Considering Palazzolo's original purchase price and that Rhode Island law has imposed restrictions on the filling of tidelands and wetlands since before 1960, *see Gerhard v. Bridge Comm'rs*, 15 R.I. 334, 5 A. 199 (R.I. 1886); R.I. Gen. Laws 46-6-1 (1956), it is doubtful that this property ever had much more than speculative value.

Under any value standard, the evidence in this case demonstrated that Palazzolo failed to establish that there had been a per se taking of the property.[8]

V. THE RHODE ISLAND COURT PROPERLY FOUND THAT REASONABLE INVESTMENT-BACKED EXPECTATIONS AND BACKGROUND PRINCIPLES OF RHODE ISLAND LAW BARRED PALAZZOLO'S TAKING CLAIM.

The Rhode Island Court took existing regulation into account in two ways when evaluating Palazzolo's taking claim: it found that when Palazzolo became the owner of the property in 1978, the right to fill wetlands was not part of the title that he acquired, *id.* at 716, and that, under the *Penn Central* test, Palazzolo lacked reasonable, investment-backed expectations that he could fill the property for a 74-unit subdivision, *id.* at 717. Palazzolo contends, however, that a court evaluating a taking claim should ignore the regulations in existence when the landowner acquired the property. Palazzolo's approach should be rejected.

The idea that there is no taking when a landowner knowingly purchases property subject to developmental

[8] Because at trial Palazzolo failed to establish any diminution in value resulting from the permit denial, *see* pp. 1-2, 15-16 *supra*, he likewise failed to establish a taking even under the *Penn Central* formulation of the takings doctrine. It bears emphasis that diminution in value should be measured by the regulation's impact on the entire parcel (such as the 20 acres in this case), not some partial segment.

restrictions is the flipside to the taking doctrine's proscription against singling out landowners to bear societal burdens – landowners, not society at large, must bear the consequences of their own actions. "The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain." *Olson*, 294 U.S. at 255. Although courts have not always agreed on the doctrinal category in which to place it, they have found that pre-existing regulations may bar a taking claim for a variety of reasons.

Reasonable, Investment-Backed Expectations. Existing regulations always have played a role in defining a landowner's reasonable investment-backed expectations in the three-part ad hoc inquiry of *Penn Central*, 438 U.S. at 124. The Court has applied this concept a number of times since, and has found that expectations are decisive particularly where the property interest involves a well-regulated enterprise and the landowner purchased the property with actual notice of the challenged regulation. *Ruckelshaus*, 467 U.S. at 1005, 1008-09; *Concrete Pipe and Prods., Inc.*, 508 U.S. at 646. The lower courts likewise have found a landowner's lack of reasonable expectations to be dispositive in the *Penn Central* inquiry. *See, e.g., District Intown Properties Ltd.*, 198 F.3d at 884; *Williams v. City of Central*, 907 P.2d 701, 707 (Colo.App. 1995); *Omni Homes, Inc.*, 481 S.E.2d at 465-66.

Here, if Palazzolo's representations and applications in the 1980's are taken at face value, he did not even intend to engage in residential development when he became the record owner of the property in 1978. *See* pp. 11-12 n.3, *supra*. Moreover, a reasonable buyer would have known or should have known in 1978 (and most

likely in 1959) that there was little chance that he would obtain approval to fill wetlands for 74 residential units, in light of existing state and federal wetlands restrictions, public trust limitations and septic requirements. E.g., JA at 63-67 (testimony of Fugate); *see* p. 21 n.7, *supra*. The original purchase price reflected these uncertainties. In these circumstances, the Rhode Island court's straightforward application of the expectations principle disposes of Palazzolo's taking claim under *Penn Central*.

The Notice Defense. Numerous courts have found that taking claims are barred where a landowner had actual notice or assumed the risk that property would be subject to the regulation upon which the taking claim was based. *See, e. g., Avenal v. United States*, 100 F.3d 933, 937-38 (Fed. Cir. 1996); *City of Virginia Beach v. Bell*, 255 Va. 395, 498 S.E.2d 414, 417-19 (Va.), *cert. denied*, 525 U.S. 826 (1998); *Alegria*, 687 A.2d at 1254-55. This approach presents the fairness issue in its most basic form: if a landowner knew or should have known that his uses of the property would be restricted when he voluntarily acquired it, the public should not subsidize the risk that he undertook. *See Dow*, 357 U.S. at 27 (not inequitable to deny recovery where purchaser acquired property with "full notice" of condemnation proceedings). A reasonable buyer in 1978 would have known that the Rhode Island agency would not have approved the residential project upon which Palazzolo predicates his taking claim.[9]

---

[9] Palazzolo's reliance on *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987), is misplaced. *Nollan* involved an excessive exaction, which is the physical taking of an already defined property interest (the right to exclude others). In a regulatory taking case, the property interest at stake (a landowner's right to engage in a particular developmental use) is not static and is subject to constant redefinition (e.g., a change in zoning where no rights have vested). This type of property interest cannot be defined until the landowner is denied a use and a court determines the owner's entitlement to engage in the use, measured in part by the landowner's expectations at the time of acquisition.

Expectations and Value. Reasonable investment-backed expectations inhere in the value of the property itself. *See Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring); *Creppel v. United States*, 41 F.3d 627, 632 (Fed.Cir. 1994). In this sense, preexisting regulations do not act as a defense to a taking claim, but are factored into the value of property because the value of the property at the time of acquisition will reflect the existing regulatory climate. *See* pp. 8-21 *supra*.[10]

Pre-existing Regulations and Background Principles. Numerous courts since *Lucas* have found, as did the Rhode Island court, that regulations which exist at the

---

[10] The facts in *Gazza v. New York State Department of Environmental Conservation*, 89 N.Y.2d 603, 679 N.E.2d 1035, 657 N.Y.S.2d 555 (N.Y.App.), *cert. denied*, 522 U.S. 813 (1997) illustrate this. Gazza paid $100,000 for a parcel of property, 65% of which was subject to wetlands restrictions at the time of purchase; this represented a substantial discount over the $360,000 that Gazza claimed that the property would have been worth without restrictions. *Id.* at 1036. The trial court found that, following the denial of the variance, the property was still worth $80,000, which meant that denial caused only a 20% diminution in the "before" value of the property. Thus, while the *Gazza* court properly found for other reasons that there was no taking, such a modest diminution in value would not independently result in a regulatory taking.

time of acquisition are part of the landowner's title and therefore form part of the background principles that define the landowner's ability to use property. *See, e.g., Outdoor Graphics v. City of Burlington*, 103 F.3d 690, 694 (8th Cir. 1996); *Wooten v. South Carolina Coastal Council*, 333 S.C. 469, 510 S.E.2d 716, 717-718 (S.C. 1999); *Basile v. Town of Southhampton*, 89 N.Y.2d 974, 678 N.E.2d 489, 491, 655 N.Y.S.2d 877 (N.Y.App.), *cert. denied*, 522 U.S. 907 (1997).

Palazzolo contends, however, that the Court in *Lucas* did not intend to include pre-existing regulations as part of the antecedent inquiry into a claimant's property interests. Despite the attention that Palazzolo gives this issue, it has little application in practice because, as a defense to a per se taking claim under *Lucas*, it comes into play only in those rare circumstances where an applicant has met the narrow test for establishing a denial of all economically viable use. Indeed, the Court need not reach this issue if it finds that there was no per se taking or resolves the taking claim against Palazzolo on some other ground.

Here, the Rhode Island Supreme Court properly found that existing regulations formed part of the background principles defining Palazzolo's property, and Rhode Island and other amici curiae have demonstrated the correctness of that holding. The States support those arguments, and offer this additional consideration.

The background principles issue has been framed in a way that focuses on the change in ownership – that is, whether the wetlands regulations that were adopted after Palazzolo's corporation acquired the property but before

Palazzolo himself acquired it form "background principles" of Palazzolo's ownership but not that of his corporation. But the change in ownership makes little difference in this case. The wetlands regulations challenged by Palazzolo formed background principles defining his property interest because, no matter when he acquired the property, Palazzolo's property interest is held subject to the Legislature's authority to declare public nuisances such as destruction of wetlands.

Legislatures have the inherent authority to declare acts injurious to the public to be a public nuisance, even if the acts were not nuisances at common law. *See City of Bakersfield v. Miller*, 64 Cal.2d 93, 48 Cal.Rptr. 889, 410 P.2d 393, 397 (Cal. 1966), *cert. denied*, 384 U.S. 988 (1966); *Starr v. Commn'r*, 226 Conn. 358, 627 A.2d 1296 (Conn. 1992); *Grundy Center v. Marion*, 231 Iowa 425, 1 N.W.2d 677 (Iowa 1942); *People v. New York Edison Co.*, 144 N.Y.S. 707, 159 A.D. 786, 789 (N.Y.App.Div. 1913). Legislatures may exercise this authority subject to a state court determination whether the legislature's declaration was unfounded or arbitrary. *Indianapolis v. Miller*, 168 Ind. 285, 80 N.E. 626, 627 (Ind. 1907); *State v. McKee*, 73 Conn. 18, 46 A. 409, 412 (Conn. 1900). As one court observed – before *Lucas* was decided – contemporary environmental legislation "represents an exercise by government of this traditional power to regulate activities in the nature of nuisances." *CEEED v. California Coastal Zone Conservation Comm'n*, 43 Cal.App.3d 306, 118 Cal. Rptr. 315, 324 (Cal.App. 1974); *see Lucas*, 505 U.S. at 1035 (recognizing "unique concerns" presented by development of "fragile" coastal land system and suggesting that expectations

regarding their regulation is not necessarily confined to traditional nuisance law) (Kennedy, J., concurring).

Background principles restricting harmful uses of property are not limited to only those uses prohibited by the common law public nuisance doctrine as it existed at the time of a particular State's admission. *Lucas*, 505 U.S. at 1030 ("changed circumstances or new knowledge may make what was previously permissible no longer so"). Human knowledge of what constitutes harmful activity has developed dramatically. Many activities now almost universally understood to cause public harm – the destruction of wetlands comes to mind – were not recognized as such in the not so distant past.

Rhode Island's system of wetlands regulation is an exercise of its traditional power to regulate public nuisances. The destruction of wetlands causes numerous public and private harms through increased flooding and erosion, the reduction and pollution of available water supply, and the lost commercial and recreational opportunities caused by the degradation of fish and wildlife habitat. *E.g.*, Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* (1984). If the operation of a pig farm may constitute a public nuisance, *e.g.*, *Jewett v. Deerhorn Enterprises, Inc.*, 281 Or. 469, 575 P.2d 164 (Or. 1978), then certainly it is not unreasonable for a legislature to conclude that it is proper to impose restrictions on the filling of wetlands to avoid these insidious impacts. Further, that the trial court found that Palazzolo's project would constitute a common law nuisance, *see* pp. 7-8 *supra*, confirms that the Rhode Island legislation against wetlands destruction is the type of traditional nuisance regulation found acceptable to the

Court in *Lucas*. *See also Jackvony v. Powel*, 67 R.I. 218, 21 A.2d 554 (R.I. 1941) (enjoining activity that interferes with constitutional protection of tidelands).

Therefore, assuming arguendo that he even owns the property, Palazzolo's title is qualified by the possibility that the Legislature might forbid or restrict uses in an exercise of its traditional authority to declare public nuisances. This background principle of Rhode Island law prohibited the wholesale destruction of wetlands proposed by Palazzolo, regardless of when he acquired the property. Therefore, Rhode Island did not engage in a taking, even assuming that Palazzolo could overcome the numerous other problems with his constitutional claim.

The judgment below should be affirmed.

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
RICHARD M. FRANK
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
JOSEPH BARBIERI
Deputy Attorney General
Counsel of Record

Attorneys for State of California

January 2001